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IN THE

Supreme Court of the United States

October Term, 1965

No. 29

Z. T. OSBORN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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CITATIONS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Z. T. Osborn, Jr., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled matter on August 27, 1965.

OPINION BELOW.

The opinion of the court below (Appendix A, *infra*, pp. 1A-22A) is reported at 350 F. 2d 497.

JURISDICTION.

The judgment of the court below (Appendix B, *infra*, p. 23A) was entered on August 27, 1965. A timely petition for rehearing was denied on October 8, 1965 (Appendix C, *infra*, p. 24A). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a conviction can be sustained where the most telling evidence against the petitioner consisted of the recording of his conversation with an informer, not known by the petitioner to be such, which was obtained by means of a device concealed on the informer, who was sent with such equipment to the petitioner's office by two United States District Judges in order to record his conversation with the petitioner, and where judges testified at the trial that this was done to determine the truth.

2. Whether obtaining the recording of a conversation by a concealed device carried on the person without the knowledge of the individual to whom the carrier of the device is talking constitutes an unreasonable search and seizure in violation of the Fourth Amendment and in violation of petitioner's rights under the Fifth Amendment.

3. Whether *Olmstead v. United States,* 277 U. S. 455, and its progeny, *On Lee v. United States,* 343 U. S. 747, and *Lopez v. United States,* 373 U. S. 427, should now be overruled.

4. Whether the court should have decided the issue of entrapment under the facts of this case because of the conduct of the Government and the acquittal of petitioner on another count of the indictment used as the basis to show predisposition.

5. Whether it was prejudicial error for the trial court to instruct the jury that if they found the tape recording was legally obtained they should find there was no entrapment and return a verdict of guilty.

6. Whether it was prejudicial error to permit the two district judges to testify that they authorized sending Vick to petitioner equipped with a tape recorder and to receive in evidence Vick's affidavit.

7. Whether the conduct attributed to the petitioner constituted a violation of Section 1503, Title 18 U. S. C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution declares that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides in pertinent part:

> * * * nor shall any person * * * be deprived of life, liberty, or proprety, without due process of law * * *

Section 1503, Title 18 U. S. C., provides in pertinent part:

> Whoever * * * corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT.

Petitioner was sentenced to three and a half years' confinement and a fine of $5,000, following his conviction by a jury on one count of a three count indictment alleging violations of 18 U. S. C. § 1503; the court below affirmed.

A. The Indictment.

Count One of the indictment charged that petitioner in November 1963 "did request, counsel, and direct" one Robert D. Vick to contact Ralph A. Elliott, who was and known to be a member of the petit jury panel from which jurors were to be drawn for a pending case, "and to offer and promise to pay the said Ralph A. Elliott $10,000 to induce the said Elliott to vote for an acquittal" if Elliott were to be selected as a juror for that trial, this in violation of 18 U. S. C. § 1503 (7a).[1]

Count Two charged a similar offense in November 1962 in respect of an earlier trial, the request being alleged to have been made to one Beard to approach D. M. Harrison who was the husband of a sitting juror (8a).

Count Three charged a similar offense in November 1962 in respect of the same earlier trial, the request being alleged to have been made to one Polk to attempt to arrange a meeting with Virgil Rye, who was the husband of a sitting juror.

Count Three was dismissed by the prosecution before trial (154a), and petitioner was acquitted on Count Two (735a). Accordingly, the statement that follows deals with the facts bearing on the first count, and is restricted, in view of the contentions made, to the evidence adduced by the prosecution. Only occasionally, to show that a particular matter is undisputed, will reference be made to testimony adduced by the defense.

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1. The letter "a" refers to the petitioner's Appendix below, copies of which have been filed with the Clerk of this Court.

B. Petitioner's Position; His Employment of Vick.

This petitioner was one of the attorneys for the defendant James R. Hoffa, in the prosecution of the latter charging jury tampering that was pending in the Nashville Division of the Middle District of Tennessee, until that case was transferred to the Eastern District after Judge Gray recused himself (155a-157a; Govt. Exs. 5-7). That indictment was returned on May 9, 1963, and the transfer took place on December 28 of the same year (155a). Petitioner had earlier been counsel for Hoffa in a substantive prosecution that had commenced in October 1962 and was terminated by a mistrial in December 1962 (123a; Govt. Exs. 1-4).

In connection with the first trial about October 16, 1962, petitioner had employed one Robert D. Vick and others to make background investigations of prospective jurors with respect to race, religion, and employment (158a, 192a, 193a, 218a, 219a). At that time, Vick was a Deputy Sheriff who conducted spare time investigations for lawyers (217a-218a). Vick lost his job as a Deputy Sheriff, but in November 1962 became a member of the Nashville Police Department. A merger of Nashville and Davidson County Government was voted and Vick became fearful that he might not be able to keep his job when his department was to be merged with the sheriff's office, because in making juror investigations for Hoffa's lawyer he had come under the Hoffa stigma (214a, 220a, 221a, 224a, 225a).

In October 1963, pretending to fear loss of his job (220a-221a, 231a-232a) and needing money (225a-226a, 259a-296a, 273a), Vick several times solicited petitioner for further employment (226a, 259a-260a; *accord,* 129a). He had been paid for his previous work with checks drawn on the account of petitioner's law firm (161a; Govt. Ex. 8). Petitioner re-employed Vick for background investigations of the petit jurors drawn for the second Hoffa trial (197a-198a) and Vick was similarly paid for that work (198a).

C. Vick's Status as a Federal Informer.

At the time of the matters alleged in the indictment, Vick was, unbeknownst to petitioner (139a), working for the United States Government (139a) as an informer, although not formally an employee (163a-165a); his mission was to report "illegal activity" to the F. B. I. (165a, 166a, 167a, 216a, 225a, 226a, 273a; cf. 135a); he had offered to make any information he might obtain available to the F. B. I., and he desired an arrangement with the Government wherein he would be protected from prosecution in return for furnishing information (257a-258a). Vick sought such employment because, having lost his job in the sheriff's office, he wanted a "clean bill of health" from the Department of Justice (215a, 220a, 225a-226a).

The time when Vick became a Federal informer was not clarified until his statements to the prosecution were made available to the defense under the *Jencks* rule.

Agent Sheridan said he first met Vick in July or August 1963 (162a-163a). Called as a defense witness on the motion to suppress (128a-142a), Vick said he talked to Sheridan in August (141a), but insisted that he had no connection with the Department of Justice until November (142a). Testifying as a witness for the prosecution, Vick denied that he had become a government agent in May 1963 (227a), and said he only became one in July (228a).

After the defense had been furnished his earlier statements, Vick admitted that his first report to the F. B. I. had been made on February 24, 1963 (253a), and that he had made another report to the F. B. I. on June 14, at which time he had told them that he had been working and wished to work for petitioner, but also desired an arrangement whereby he would be protected from prosecution in return for furnishing information (250a-251a; *accord,* 257a-258a). Then (215a)—

> "Q. Well, why did you tell us then that you had never made any offer to inform, this morning, before July?

"A. Well, I didn't intend to tell you that, Mr. Norman [defense counsel], if I did."

The testimony of the petitioner Osborn corroborated Vick's evidence that Osborn had no inkling of Vick's status as a Federal informer (449a, 456a, 457a, 463a).

Since the date of the matters alleged in the indictment, Vick, although paid by the Nashville Police Department, had done no work for them, but had been on special assignment for the Federal government (192a, 231a-233a; *accord,* 128a-129a).

D. Vick's Proposal to the Petitioner.

Late in October 1963, then, Vick was again making background investigations of prospective jurors for petitioner while reporting behind his employer's back to the F. B. I. At this point Vick said that Robert Elliott, one of the jurors on the list (156a; Govt. Exs. 6, 7), was a second cousin of his (200a-201a). According to Vick, petitioner then asked Vick to see Elliott (203a-204a).

After reporting this conversation to Sheridan, who had told Vick that he would like Vick to represent him (166a), Vick returned to petitioner on the next day, saying that he had seen Elliott and that Elliott was susceptible to hanging the Hoffa jury (206a). In fact, Vick had not seen Elliott (206a); when Vick told petitioner "I have been to see him," that was all a lie (264a)—and Vick had never intended to talk to or get in touch with Elliott (260a; *accord,* 132a, 135a, 138a-140a). Nothing had happened, the whole matter was Vick's pretense to petitioner (260a; *accord,* 135a). Further (Vick on cross-examination, 262a-263a):

"Q. But you did pretend to Tommy Osborn you would go to Mr. Elliott?

"A. Yes, sir, I did.

"Q. Could never any harm come out of it. You of course knew it at the beginning, didn't you?

"A. No intention whatever.

"Q. No intention whatever. So the only purpose was to lie to Osborn into believing you would, wasn't it?

"A. I suppose that is correct.

"Q. So, in order to build that a little stronger, to suck him in a little further, you then went back and told Osborn you saw Elliott?

"A. Yes.

"Q. And did you suck him in, did you?

"A. No, sir.

"Q. Why did——?

"A. The Department of Justice was trying to discover evidence of an effort at jury tampering, and I did go to see him.

"Q. It was false?

"A. Didn't intend to suck him in?

"Q. It was false?

"A. Yes.

"Q. But you told Osborn you had seen him?

"A. Yes, sir.

"Q. Well, the reason was to suck him in?

"A. Find out what he was going to do.

"Q. Find out what he was going to do?

"A. In fact, the Department of Justice didn't really believe we had had this conversation."

Vick "was trying to find out what Mr. Osborn's intentions were" (265a), although he, Vick, admitted that he did not intend to ever do anything about it (265a). "It was necessary—nobody believed that Mr. Osborn was attempting to tamper with the jury—the juror. It was necessary to go through with this in order to prove this" (266a). Further (still Vick on cross-examination, 266a-267a):

"Q. Yes. So your idea and your purpose was to get Mr. Osborn to follow your pretense, then? That right?

"A. No, sir.

"Q. Isn't that what you just said?

"A. I was trying to find out what Mr. Osborn's intentions were and prove it, and make a case, Mr. Norman.

"Q. Make a case?

"A. Yes, sir.

"Q. In other words, you were trying to make a case on him?

"A. I am a policeman, and you know this."

After Vick in his second conversation with petitioner had stated that "Elliott was susceptible to money for hanging this jury in this tampering case * * * against Hoffa" (206a), petitioner according to Vick offered $5,000 for Elliott when and if he got on the jury, and $5,000 more after the trial, and that he should hold out for acquittal all the way (206a-207a). Vick reported this conversation (208a).

The record shows that, before Vick told Osborn that Elliott was a cousin of his, on October 21, 1963, he had advised Sheridan of that fact (556a).

The record also shows that in September 1963, before being employed by petitioner for the final work to be performed by Vick, and during the period when the work theretofore done by Vick was being done by others, Vick on his own obtained a copy of the jury list from the courthouse and went to a Nashville lawyer named Samuel Eugene Wallace (269a, 576a-580a). He told Wallace he had a cousin on the jury and asked Wallace whether he thought a juror would be worth $50,000 to Hoffa; questioned as to this Vick answered "I don't know I could very well have done it. Mr. Wallace and I have discussed this" (269a). The question was repeated after objection and discussion (271a); now what do you say about it? Vick said "Now I say that I was trying to find out whether Mr. Wallace had any connection with the Hoffa case. He had said to me he had not. And perhaps I made some statement to find out whether he would have some connection there or not . . .

"Q. Do I understand you now to say you were trying to trap Mr. Wallace in something?

"A. No, sir, I was trying to find out . . ." (271a)

E. Use by Vick of a Concealed Tape Recorder Authorized by Both United States District Judges.

Vick made an affidavit covering his first conversation with petitioner concerning Elliott (201a; Govt. Ex. 17, 653a-655a). This was made available to the two United States District Judges for the Middle District of Tennessee (383a) who then (383a) "authorized further investigation of the matter, including, specifically, an authorization for the Department of Justice to send Robert D. Vick back to talk with [Osborn] equipped with a tape recorder."

The record shows that, unknown to petitioner (as indeed the prosecution admitted at the trial, 172a) Vick made three trips to petitioner's office with a tape recorder on his person.

The first such trip took place on November 8, 1963 (176a, 202a); on this occasion the recorder did not function (178a, 204a). A second trip was made on the following day (205a); but appellant was not in the office. Finally, on November 11, when Vick made a third trip to discuss Elliott with petitioner (180a-181a, 205a), the tape recorder worked. The tape was sent to the F. B. I. laboratory in Washington (181a), where a filtered copy was made (182a, 414a). The original tape was admitted as Govt. Ex. 10 (183a), the filtered copy as Govt. Ex. 11 (183a-184a), and the transcription as Govt. Ex. 12 (184a-185a). Both participants in the conversation, as well as the F. B. I. agent, agreed that the transcription accurately recorded the conversation (184a-185a, 210a, 426a).

That conversation had petitioner discussing with Vick means of reaching Elliott and offering to pay him money to hang the jury (532a-541a, 544a-547a, 548a, 553a); it is set forth in full in the opinion of the court below, *infra*, pp. 4A-11A.

F. Confrontation and Disbarment.

Petitioner on three separate occasions prior to the return of the indictment herein appeared before judges of the Middle District of Tennessee in respect of the matters alleged in that indictment.

On November 15, 1963, he appeared alone before Judges Gray and Miller. He waived counsel. Being told that there was substantial information to show his personal implication in a plan to contact and improperly influence a juror named Elliott, he denied generally any plan or efforts to tamper with or improperly influence the jury panel that had been drawn, and denied any conversation with anyone for that purpose, specifically denying any effort to contact Elliott. He was thereupon served with an order to show cause why he should not be disbarred, which had already been prepared (363a-366a; Govt. Ex. 13, 370a-381a).

On the next day, November 16, accompanied by two lawyers as counsel, petitioner appeared before Judge Gray to ask for the information that underlay the foregoing order to show cause. Judge Gray said that the two judges had three affidavits from Vick, that on the basis of the first one both judges had authorized Vick to take a tape recorder to record his further conversations with petitioner, and that they had the tape recording thus made, as well as further statements and affidavits. Judge Gray refused to make the statements available to petitioner, but said that the recorded conversation showed that petitioner had authorized an improper contact with Elliott (366a-367a; Govt. Ex. 14, 381a-384a).

A third hearing took place on November 19, 1963, before Judge Miller. Petitioner waived counsel, said he was appearing voluntarily, and denied that any promises, inducements, or representations had been made to him.

He said that he had warned Vick not to approach Elliott, that he had no plan to approach Elliott and no

authorization or source of funds for any offer to him. He said that, semi-exhausted with overwork, "I walked right into the trap," and that for the same reason he was susceptible to Vick's approach.

The tape recording and numerous affidavits were at this hearing received in evidence, and F. B. I. agents Steele and Sheets testified. Petitioner waived calling or cross-examining Vick, stated that the tape recording was accurate, and insisted he was led into the entire matter by Vick (367a-369a; Govt. Ex. 15, 385a-434a; sub-exhibits A through N to Govt. Ex. 15).

Testifying on his own behalf at the trial, petitioner admitted that he made untrue statements before Judges Gray and Miller at the first hearing because of a desire to protect Vick (467a, 514a-517a), and stated, what is not in controversy, that following those hearings he was disbarred and thereafter was indicted (469a). Disbarment proceedings against him in the State courts are pending but meanwhile he is not practicing law at all (510a-511a).

G. The Rebuttal Testimony of the District Judges and the Reception in Evidence of Vick's Affidavit.

The government was permitted, over objection, to adduce the testimony of District Judges Gray and Miller on rebuttal, after petitioner closed his defense, for the ostensible purpose of showing whether or not there was entrapment (651a-652a). The testimony of the judges related the circumstances under which they authorized the tape recording by Vick, particularly concerning the fact that they then had an affidavit from Vick (651a-662a). Vick's affidavit, which the court had previously refused to admit into evidence (407a-408a), was now received (Government Exhibit 17) over objection, and read to the jury (653a-656a). The judges were permitted to express deep concern over the gravity of the offense charged (657a-659a), and to voice the disbelief of the prosecutors in the charge of Vick (658a, 660a). Therefore, they testified, they authorized the tape

recording by Vick to determine what the truth was (657a, 659a-660a). The objections of petitioner were overruled, as was his motion to strike the testimony (661a-662a).

H. Petitioner's Motion to Suppress.

Petitioner filed a motion under Rule 41(e), F. R. Crim. P., to suppress the tape recording of his conversation with Vick on November 11, 1963, that Vick had obtained, and called Vick and other witnesses (128a-153a). This was before Vick's *Jencks* statements had been turned over. Vick's testimony accordingly differed from what he testified to at the trial in significant particulars.

At the hearing on the motion to suppress, Vick said he had never discussed Elliott with anyone before talking to petitioner (130a, 131a), specifically denying that he had discussed his relationship to Elliott with the United States Government (131a); at the trial it was shown that he had informed the F. B. I. agent Sheridan of his relationship to Elliott a week before he was reemployed by petitioner (348a-349a).

At the hearing on the motion to suppress, Vick said he never had any connection with the Department of Justice about his plan to supply information obtained while working for petitioner before November (142a); at the trial it was shown that he had made reports to the Department in February, June, July or August, and October.

Following the hearing on the motion to suppress, and on the basis of the evidence adduced at that time, the trial judge ruled that, on the authority of the *Lopez* and *On Lee* cases [*On Lee v. United States,* 343 U. S. 747; *Lopez v. United States,* 373 U. S. 427], the tape recording was admissible; and that there was no entrapment, because Vick did not lure the appellant into conversation but merely provided the opportunity, and because neither Vick nor the F. B. I. agents incited or created the offense (153a).

I. Motion for Judgement of Acquittal.

At the conclusion of evidence of the Government's case in chief a motion for judgment of acquittal was made. ". . . and for the reason that the Government's proof shows conclusively that any actions of the defendant in this cause proven by the Government were in connection, not with any offense or violation of the law, but with regard to a pretended offense, originated, designed, prepared, mechanized, instituted and continued by agents of the United States Government, and for the reason that any connection or association with or participation in said pretended offense, or offenses, by the defendant was the result of deliberate, premeditated and detailed fashioned entrapment on the part of the agents of the United States Government." This motion was overruled (435a-436a).

J. The Charge Concerning Entrapment.

In instructing the jury on the issue of entrapment, *inter alia,* the trial judge submitted as petitioner's contention that the tape recording was unlawfully obtained, and charged the jury that if they found against this contention they should find that there was no entrapment and return a verdict of guilty (697a-698a).

K. The Ruling Below.

In respect of the issues raised by the present petition, only the following need be noted:

The court below held that the recording was admissible, citing, *inter alia, On Lee v. United States,* 343 U. S. 747, and *Lopez v. United States,* 373 U. S. 427, adding in a footnote that

> "In view of the strong dissent in *Lopez* (see *Lopez v. United States,* 373 U. S. at 446) to the controlling rule described above, it may be relevant to note that the essentials of search warrant procedures were car-

ried out in the instant case, albeit no statutory authority for such a warrant exists. These include appearance before a court, a showing of probable cause, a specific judicial authorization for the search, including a description of method and object." (Appendix A, *infra,* p. 11A)

On the entrapment issue, the court below, quoting the entire recorded conversation but not mentioning any of the prior conversations between Vick and the petitioner, concluded that the jury was justified in finding that there was no entrapment and that even though petitioner was acquitted on Count 2 the jury might still have properly considered the evidence pertaining to this Count on the issue of an existing disposition and that it was not error to refuse to charge the jury that "they could not consider any evidence offered pertaining to one count in determining the truth or falsity of the other count" (Appendix A, *infra,* pp. 21A-22A).

The court below held that telling a third person to offer a bribe to a prospective juror is a corrupt "endeavor to influence" within 18 U. S. C. § 1503, stating that the lack of intent on the part of Vick, the third person, who was a secret government agent, did not insulate petitioner from prosecution (Appendix A, *infra,* p. 15A).

REASONS FOR GRANTING THE WRIT.

The classic dissent of Mr. Justice Brandeis in *Olmstead v. United States,* 277 U. S. 455, 471, still continues to trouble all who have occasion to consider the doctrine of that decision, despite its reaffirmance first in *On Lee v. United States,* 343 U. S. 747, and then more recently in *Lopez v. United States,* 373 U. S. 427. The present case, which demonstrates the permissible reach even today of the *Olmstead* rule, provides and indeed requires that its scope be once again scrutinized—and reexamined.

For here the agent wired-for-sound was sent to take down the petitioner's words, not by perhaps understandably over-zealous enforcement agents, but by two United States judges. However serious the offense of which petitioner has been convicted, however much it is an offense that impairs the due administration of justice, here the methods of detection used, where members of the bench have actually stepped down into the arena to track down suspected offenders on their own, seem to us to involve an infinitely more serious impairment of the administration of justice, one that is vastly more disturbing in its implications.

Accordingly, we think the time has once more come to grapple with the *Olmstead* problem—which will not down.

First. It may be taken as an infallible signal that reasoning is untenable whenever any essential link in the argument is dropped down from the text into a footnote. Here, after citing the *On Lee* and *Lopez* cases as authority —and in any lower Federal court the holdings of these cases were plainly binding and not open to reconsideration—the court below unconsciously but unmistakably pinpointed the vice in its process of arriving at the conclusion now sought to be reviewed when it footnoted the makeweight argument that what was done here could be equated with the issuance of a search warrant.

Quite apart from the admitted lack of statutory authority for a warrant in the present case, what was done

here differed in two material respects from recognized search warrant procedures.

One. When an officer of the law serves a warrant, he announces to all and sundry that he has such a warrant before proceeding to execute that source of his authority. Here, obviously, Vick never disclosed that he was a Government agent (which of course distinguishes the *Lopez* case without more), much less that he was wired for sound. Plainly, therefore, this situation cannot be analogized to the execution of a search warrant; search warrants are executed by persons who proclaim both their official status and the additional *ad hoc* authority that the warrant confers upon them.

Two. When a search warrant is duly issued by a court upon a showing of probable cause, the results of that search are retained by those charged with the enforcement of the law, after which the fruits of the lawful search are presented to the bodies or the individuals who are authorized to return indictments or to file informations. In the search warrant situation, the evidence obtained through execution of the warrant is never seen by the judge until it comes before him in due course, as by a motion to suppress, or by a motion to dismiss the resultant indictment, or in the course of the trial had on the indictment. Here however the fruits of Vick's wiring-for-sound were immediately played back to the two judges, as though the judges were themselves part of the prosecutorial staff.

Therein lies the grave irregularity disclosed by the present record: Two members of the Federal bench joined with and became indistinguishable from the prosecution, and at the trial testified on rebuttal, over objection, that they had authorized the recording to determine "what the truth was (657a, 659a-660a).

Without further elaboration, we submit that the situation presented here constitutes such a wide departure from the norm of hitherto accepted concepts of the judicial function as to call for this Court's scrutiny.

Second. The setting in which the present surreptitiously concealed recording device was used, not only with judicial sanction but literally because of judicial instigation, should strongly incline to a reexamination of the entire *Olmstead, On Lee,* and *Lopez* doctrine.

There is no need here to rehearse or even to summarize the arguments, so strongly made in the several dissenting opinions in the three cited cases, in support of the proposition that the carrying of a concealed recording device, of which a party is ignorant, in order to obtain statements from such party on which to institute a criminal prosecution, constitutes an unreasonable search and seizure in violation of the Fourth Amendment. Furthermore, a person is compelled to be a witness against himself and to forfeit his right of privacy, protected by the Fifth Amendment when incriminating conversations are secretly taken from him "by a contrivance of modern science." A person, it is submitted, has a right not to have his conversation recorded and divulged without his knowledge and consent.

It seems sufficient for present purposes merely to urge that, when the use of such a device is sanctioned in circumstances such as those now appearing, the doctrine permitting that use must be regarded as doubtful, calling for thorough reexamination of its premises.

Accordingly, without further discussion, we ask that the Court at this juncture frankly consider whether *Olmstead v. United States,* 277 U. S. 455, and its progeny, *On Lee v. United States,* 343 U. S. 747, and *Lopez v. United States,* 373 U. S. 427, should not now, at long last, be squarely overruled.

Third. How far did petitioner's acts in fact result from the suggestions made by Vick, who was the undercover agent of the F. B. I.

The court below failed to give any effect whatever to Vick's repeated admissions that he was only trying to

find petitioner's intentions and make a case.[2] See particularly 266a-267a, quoted *supra*, at p. 9.

In this connection, we refer to a recent thoughtful and scholarly study, *"The Serpent Beguiled Me and I Did Eat"—the Constitutional Status of the Entrapment Defense*, 74 Yale L. J. 942.

Starting with the premise expressed in *Sherman v. United States*, 356 U. S. 369, 372, that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations," the cited study suggests that a conviction can be had only in a situation where there are reasonable grounds for believing that the solicitee is engaged in criminal activity, and when it appears reasonably certain that he would have committed a similar offense in the absence of solicitation. Those prerequisites, plainly, are not present in the instant case.

The study goes on to say that "Solicitation for the sake of obtaining convictions transforms a law to promote the general welfare into a technique designed to foster disobedience in order to punish," and that "Since a solicited offense is contrived and controlled by the police, it is difficult to see how it could be harmful to society." Accordingly, the study concludes that "Any test * * * which allows unlimited solicitation and conviction of all those who succumb is inconsistent with the Constitution," because "Due process forbids the conviction of any person for a solicited offense unless he had been engaged in a course of criminal conduct or had a criminal design."

It is not necessary to pursue the matter at greater length now. In our view it is enough now to urge that, on this record, petitioner's conviction for the words spoken to his employee, Vick, at Vick's solicitation did not measure up to accepted constitutional norms. We submit that as a matter of law the court should have held that petitioner

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2. Vick, of course, testified he never had the slightest intention of approaching his cousin the juryman Elliott (132a-133a, 260a-263a). It was all a pretense.

was unlawfully entrapped and this issue should not have been submitted to the jury. At any rate, the court's interpretation of the entrapment issue is clearly erroneous in the belief that it should have been submitted to the jury (Appendix A, *infra*, pp. 16A-17A). Further, it was basic prejudicial error to instruct the jury that if the tape recording had been obtained by lawful means there was no entrapment and to return a verdict for the Government on Count One (698a).

There is simply no evidence to establish the fact that there was any thought in petitioner's mind of endeavoring to contact any juror until Vick attempted to try to find out what "Osborn's intentions were and prove it, and make a case, Mr. Norman" (266a), admittedly by a series of lies.

It is not the business of our Government to seek to try to find out what a person's intentions are by first tempting him to commit a crime where without the temptation there would have been no crime. There is no escape from the fact that Vick told Osborn that his cousin was on the jury panel only to tempt Osborn.

We submit that the power of the Government is abused when as here it is employed to tempt people to commit crimes rather than prevent crimes.

But, even if we should be wrong in asserting that petitioner was as a matter of law a victim of entrapment, at the very least he should in the interest of justice be granted a new trial on Count One, a trial in which no evidence of an alleged predisposition to commit the crime based on the matters alleged in Count Two would be admissible, inasmuch as all such evidence related to a matter in respect of which he has been finally and irrevocably acquitted.

Fourth. Petitioner points out that the so-called rebuttal testimony of Judges Gray and Miller exceeded the justification for rebuttal testimony. By this device, the government introduced to the jury the judges' belief that the

tape showed the truth, that petitioner was guilty. And, the testimony bound up the issue of entrapment with the issue of the legality of the tape recording—a proposition on which the trial judge erroneously instructed the jury that if they found that the recording was lawfully obtained, they should find that there was no entrapment and return a verdict of guilty (697a-698a).

Unlike *Lopez v. United States, supra,* where Justice Harlan stated, 373 U. S., at 437, "Accordingly, we do not reach the question whether the charge was in every respect a correct statement of the law." in this case there is clear reversible error. "When a false issue of magnitude sufficient to nullify proper consideration of the issues is inserted into a case, the proper administration of justice is thwarted and a conviction so based cannot stand." *Michaud v. United States,* 350 F. 2d 131, 134 (C. A. 10).

The decision of the court below, which sustains the admission into evidence of Vick's affidavit to bolster the government's case without limiting instructions, is in direct conflict with the decisions of the Fifth and Third Circuits: *Mellon v. United States,* 170 F. 2d 583, 585; *United States v. Toner,* 173 F. 2d 140, 142-143.

Fifth. Finally, unlike various other prosecutions recently sustained by the court below, see *United States v. Hoffa,* 349 F. 2d 20, here there was no actual "endeavor" to obstruct justice. Vick was working for the government and had previously informed government agent Sheridan of his relationship to Elliott. Except for his relationship to the government, Vick would have been a co-conspirator. Vick's own words were that he intended to "make a case," and all his reports to the petitioner were fiction, intended to lead him on. In the circumstances, an offense under 18 U. S. C. § 1503 was impossible.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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November 1965.

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APPENDIX A.

Opinion Below.

No. 16056

Filed
Aug 27 1965
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. Z. T. OSBORN, JR., *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided August 27, 1965.

Before: MILLER, O'SULLIVAN and EDWARDS, *Circuit Judges.*

EDWARDS, Circuit Judge. Defendant appeals from his conviction before a United States District Court jury in Nashville, Tennessee, on one of two counts charging him with the crime of jury tampering. He was sentenced to three and one-half years in the federal penitentiary.

Defendant had been indicted on three counts of violating 18 U. S. C. § 1503. Count one of the indictment charged that appellant in November 1963 "did request, counsel, and direct" one Robert D. Vick to contact Ralph A. Elliott, who was and known to be a member of the petit jury panel from which jurors were to be drawn for a pending case, "and to offer and promise to pay the said Ralph A. Elliott $10,000 to induce the said Elliott to vote for an acquittal" if Elliott were to be selected as a juror for that trial, this in violation of 18 U. S. C. § 1503.

Count Two charged a similar offense in November 1962 in relation to the "Test Fleet" trial, the request being alleged to have been made to a lawyer named Beard to approach D. M. Harrsion, the husband of a sitting juror.

Defendant was convicted on Count One and acquitted on Count Two. The third count had been dismissed before trial.

At the time of the events in question, defendant was a prominent and successful lawyer who had handled a good deal of important litigation. Just before the happenings which led to this indictment, he had served (and was serving) as local counsel for defendant James R. Hoffa in *United States v. James R. Hoffa & Commercial Carriers, Inc.,* (Criminal No. 13241, United States District Court, Middle District of Tennessee, Nashville Division) (the so-called "Test Fleet" case) wherein his client had been the subject of mistrial resulting from a divided or "hung" jury.

Subsequent to the conclusion of the "Test Fleet" case, evidence was presented to a federal grand jury which resulted in the indictment of Hoffa and a number of other defendants on charges of jury tampering pertaining to alleged approaches to the "Test Fleet" case jury. *United States v. James R. Hoffa, et al.,* (Criminal No. 11,989, United States District Court, Eastern District of Tennessee, Southern Division, at Chattanooga). See — F. 2d — (C. A. 6, 1965), Decided July 29, 1965.

This Hoffa jury tampering case was originally scheduled to be tried in the United States District Court for the Middle District of Tennessee, Nashville, Tennessee, and it was expected that the jury panel for that District would be the panel from which the *Hoffa, et al.,* jury tampering case would be chosen.

Prior to the transfer of the *United States v. Hoffa, et al.,* trial on jury tampering to Chattanooga, Tennessee, the Federal Bureau of Investigation called to the attention of two of the United States District Judges for the Middle District of Tennessee (Judges Miller and Gray) that an informant, one Vick, had brought them charges to the effect that Hoffa's local counsel, defendant herein, was seeking to make contact through intermediaries with prospective members of the *Hoffa, et al.,* jury. Vick was an officer of the Nashville Police Department whom defendant had employed during the "Test Fleet" trial to investigate jurors.

The two District Judges, although openly skeptical of the information, authorized the informant to seek further conversation with defendant, carrying on his person a recording device by which they, the judges, would later be able to hear what transpired.

Vick twice talked with appellant with the recording device concealed on him, but it twice failed to operate. On the third occasion the recorder did operate and the tape thus produced resulted in such confirmation of Vick's information as to occasion appellant's disbarment in the federal courts and the indictment in the present case.

At trial of the presently considered charges Vick testified and the recording of the last of his conversations with appellant was introduced in corroboration.

Vick testified that his representations to appellant concerning conversations with and willingness to bribe prospective juror Elliott were false. At the time they were made, Vick indicated he was reporting to FBI and Justice Department personnel. The jury also heard defendant's

admission that the transcript of this recording was "substantially correct."

Since on this appeal defendant's primary appellate issue is a claim of legal entrapment, we feel it relevant to reproduce the record of this conversation in its entirety:

"GIRL: You can go in now.

"VICK: O. K. honey.

"Hello, Mr. Osborn.

"OSBORN: Hello, Bob, close the door, my friend, and let's see what's up.

"VICK: How're you doing?

"OSBORN: No good. How're you doing?

"VICK: Oh, pretty good. You want to talk in here?

"OSBORNE: How far did you go?

"VICK: Well, pretty far.

"OSBORN: Maybe we'd better . . .

"VICK: Whatever you say. Don't make any difference to me.

"OSBORN: (Inaudible whisper.)

"VICK: I'm comfortable, but er, this chair sits good, but we'll take off if you want to, but

"OSBORN: Did you talk to him?

"VICK: Huh?

"OSBORN: Did you talk to him?

"VICK: Yeah. I went down to Springfield Saturday morning and talked to er.

"OSBORN: Elliott?

"VICK: Elliott.

"OSBORN: (Inaudible whisper.)

"VICK: Huh?

"OSBORN: Is there any chance in the world that he would report you?

"VICK: That he will report me to the FBI? Why of course, there's always a chance, but I wouldn't get into it if I thought it was very, very great.

"OSBORN: (Laughed.)

"VICK: You understand that.

"OSBORN: (Laughing) Yeah, I do know. Old Bob first.

"VICK: That's right. Don't worry. I'm gonna take care of old Bob and I know, and of course I'm depending on you to take care of old Bob if anything, if anything goes wrong.

"OSBORN: I am. I am. Why certainly.

"VICK: Er, we had coffee Saturday morning and now I had previously told you that it's the son.

"OSBORN: It is?

"VICK: Yes, and not the father.

"OSBORN: That's right.

"VICK: The son is Ralph Alden Elliott and the father is Ralph Donnal. Alden is er—Marie, that's Ralph's wife who killed herself. That was her maiden name, Alden, see? Anyway, we had coffee and he's been on a hung jury up here this week, see?

"OSBORN: I know that.

"VICK: Well, I didn't know that but anyway, he brought that up so he got to talking about the last Hoffa case being hung, you know, and some guy refusing $10,000 to hang it, see, and he said the guy was crazy, he should've took it, you know, and so we talked about and so just discreetly, you know, and course I'm really playing this thing slow, that's the reason I asked you if you wanted a lawyer down there

to handle it or you wanted me to handle it, cause I'm gonna play it easy.

"OSBORN: The less people, the better.

"VICK: That's right. Well, I'm gonna play it slow and easy myself and er, anyway, we talked about er, something about five thousand now and five thousand later, see, so he did, he brought up five thousand see, and talking about about (sic) how they pay it off you know and things like that. I don't know whether he suspected why I was there or not cause I don't just drop out of the blue to visit him socially, you know. We're friends, close, and kin, cousins, but I don't ordinarily just, we don't fraternize, you know, and er, so he seemed very receptive for er, to hand the thing for five now and five later. Now, er, I thought I would report back to you and see what you say.

"OSBORN: That's fine! The thing to do is set it up for a point later so you won't be running back and forth.

"VICK: Yeah.

"OSBORN: Tell him it's a deal.

"VICK: It's what?

"OSBORN: That it's a deal. What we'll have to do when it gets down to the trial date, when we know the date, tomorrow for example if the Supreme Court rules against us, well, within a week we'll know when the trial comes. Then he has to be certain that when he gets on, he's got to know that he'll just be talking to you and nobody else.

"VICK: Social strictly.

"OSBORN: O yeah.

"VICK: I've got my story all fixed on that.

"OSBORN: Then he will have to know where to, he will have to know where to come.

"VICK: Well, er . . .

"OSBORN: And he'll have to know when.

"VICK: Er, do you want to use him yourself? You want me to handle it or what?

"OSBORN: Uh huh. Your'e gonna handle it yourself.

"VICK: All right. You want to know it when he's ready, when I think he's ready for the five thousand. Is that right?

"OSBORN: Well no, when he gets on the panel, once he gets on the jury. Provided he gets on the panel.

"VICK: Yeah. Oh yeah. That's right. That's right. Well now, he's on the number one.

"OSBORN: I know, but now . . .

"VICK: But you don't know that would be the one.

"OSBORN: Well, I know this, that if we go to trial before that jury he'll be on it but suppose the government challenges him over being on another hung jury.

"VICK: Oh, I see.

"OSBORN: Where are we then?

"VICK: Oh I see. I see.

"OSBORN: So we have to be certain that he makes it on the jury.

"VICK: Well now, here's one thing, Tommy. He's a member of the CWA, see, and the Teamsters, or

"OSBORN: Well, they'll knock him off.

"VICK: Naw, they won't. They've had a fight with CWA, see?

"OSBORN: I think everything looks perfect.

"VICK: I think it's in our favor, see. I think that'll work to our favor.

"OSBORN: That's why I'm so anxious that they accept him.

"VICK: I think they would, too. I don't think they would have a reason in the world to. I don't think that I'm under any surveillance or suspicion or anything like that.

"OSBORN: I don't think so.

"VICK: I don't know. I don't frankly think, since last year and since I told them I was through with the thing, I don't think I have been. Now, Fred,

"OSBORN: I don't think you have either.

"VICK: You know Fred and I may not (pause) he, may be too suspicious and I may not be suspicious enough. I don't know.

"OSBORN: I think you've got it sized up exactly right.

"VICK: Well, I think so.

"OSBORN: Now, you know you promised that fella that you would have nothing more to do with that case.

"VICK: That's right.

"OSBORN: At that time you had already checked on some of the jury that went into Miller's court. You went ahead and did that.

"VICK: Well, here's another thing, Tommy.

"OSBORN: . . . church affiliations, background, occupation and that sort of thing on those that went into Miller's court. You didn't even touch them. You didn't even investigate the people that were in Judge Gray's court.

"VICK: Well, here's the thing about it, Tommy. Soon as this damn thing's over, they're gonna kick my —out anyway, so probably Fred's too. So I might as well get out of it what I can. The way I look at it.

I might be wrong, cause the Tennessean is not gonna have anything to do with anybody that's had anything to do with the case now or in the past, you know that. Cause they're too close to the Kennedys.

"OSBORN: All right, so we'll leave it to you. The only thing to do would be to tell him in other words your next contact with him would be to tell him if he wants that deal, he's got it.

"VICK: O. K.

"OSBORN: The only thing it depends upon is him being accepted on the jury. If the government challenges him there will be no deal.

"VICK: All right. If he is seated.

"OSBORN: If he's seated.

"VICK: He can expect five thousand then and

"OSBORN: Immediately.

"VICK: Immediately and then five thousand when it's hung. Is that right?

"OSBORN: All the way, now!

"VICK: Oh, he's got to stay all the way?

"OSBORN: All the way.

"VICK: No swing. You don't want him to swing like we discussed once before. You want him

"OSBORN: Of course, he could be guided by his own b , but that always leave a question. The thing to do is just stick with his crowd. That way we'll look better and maybe they'll have to go to another trial if we get a pretty good count.

"VICK: Oh. Now, I'm going to play it just like you told me previously, to reassure him and keep him from getting panicky, you know. I have reason to believe that he won't be alone, you know.

"OSBORN: You assure him of that. 100%.

"VICK: And to keep any fears down that he might have, see?

"OSBORN: Tell him there will be at least two others with him.

"VICK: Now, another thing, I want to ask you does John know anything. You know. I originally told John about me knowing.

"OSBORN: He does not know one thing.

"VICK: He doesn't know? O. K.

"OSBORN: He'll come in and recommend this man —and I'll say well just let it alone, you know.

"VICK: Yeah. So he doesn't know anything about this at all?

"OSBORN: Nothing.

"VICK: Now he hasn't seen me. When I first came here he was in here, see.

"OSBORN:—We'll keep it secret. The way to keep it safe is that nobody knows about it but you and me —Where could they ever go?

"VICK: Well, that's it, I reckon, or I'll probable go down there. See, I'm off tonight. I'm off Sunday and Monday, see. That's why I talked to you yesterday. I had a notion to go down there yesterday cause I was off last night and I'm off again tonight.

"OSBORN: It will be a week at least until we know the trial date.

"VICK: O. K. You want to hold up doing anything further till we know.

"OSBORN: Unless he should happen to give you a call and—something like that, then you just tell him, whenever you happen to run into him.

"VICK: Well, he's not apt to call, cause see

"OSBORN: You were very circumspect.

"VICK: Yeah. We haven't talked really definite and I think he clearly understands. Now, he might, it seemed to me that maybe he thought I was joking or, you know.

"OSBORN: That's a good way to leave it, he's the one that brought it up.

"VICK: That's right.

"OSBORN: ——

"VICK: Well, I knew he would before I went down there.

"OSBORN: Well,——

"VICK: Huh?

"OSBORN: I'll be talking to you.

"VICK: I'll wait a day or two.

"OSBORN: Yeah, I would.

"VICK: Before I contact him. Don't want to seem anxious and er

"OSBORN: ——

"VICK: O. K. See you later."

The courts have repeatedly held that a recording of a conversation made by one party in the presence of but without the knowledge of another party, may be admitted in evidence to corroborate the testimony of the party who makes the record.[1] *Lopez v. United States,* 373 U. S. 427 (1963); *On Lee v. United States,* 343 U. S. 747 (1952); *Monroe v. United States,* 234 F. 2d 49 (C. A. D. C., 1956),

1. In view of the strong dissent in *Lopez* (See *Lopez v. United States,* 373 U. S. at 446) to the controlling rule described above, it may be relevant to note that the essentials of search warrant procedures were carried out in the instant case, albeit no statutory authority for such a warrant exists. These include appearance before a court, a showing of probable cause, a specific judicial authorization for the search, including a description of method and object.

cert. denied, 352 U. S. 873 (1956); *United States v. Hall,* 342 F. 2d 849 (C. A. 4, 1965); *United States v. Schanerman,* 150 F. 2d 941 (C. A. 3, 1945); *Addison v. United States,* 317 F. 2d 808 (C. A. 5, 1963), *cert. denied,* 376 U. S. 905 (1964); *Byrnes v. United States,* 327 F. 2d 825 (C. A. 9, 1964).

The principal limitation on this holding pertains to establishing the authenticity and the accuracy of the record. In the instant case the authenticity and accuracy of the quoted transcript is conceded.

In *United States v. Miller,* 316 F. 2d 81 (C. A. 6, 1963), this court specifically declined to hold inadmissible evidence of government agents based on their hearing a radio transmission of a conversation by use of a transmitter (Fargo device secreted on the person of one of the parties.

The statute under which this case was tried provides as follows:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court, or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or

property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. 18 U. S. C. § 1503."

This statute mirrors the national concern with preserving the integrity of the jury trial as the cornerstone of this nation's criminal law. Under its terms it is obvious that Congress has intended not merely to make successful bribing of a juror a crime, but likewise to make it a criminal offense to do any act which has the ultimate bribing of a juror as its purpose.

Defendant herein contends first, that what he did, did not constitute violation of this statute, and second, that if it did, he was entrapped into doing it.

The principal interpretations of this statute have been made by the United States Supreme Court in *United States v. Russell,* 255 U. S. 138 (1921); *Sorrells v. United States,* 287 U. S. 435 (1932); and *Sherman v. United States,* 356 U. S. 369 (1958). (See also *United States v. Gosser,* 339 F. 2d 102 (C. A. 6, 1964). In these cases the following principles were laid down pertaining to the substantive offense and to the defense of legal entrapment.

In *Russell* we find this definition of the key word "endeavor."

"The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal because he was

cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section." *United States v. Russell, supra,* at 143.

In *Sherman* we find this discussion of entrapment:

"To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in *Sorrells.* On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and *predisposition*' as bearing on his claim of innocence.' (Emphasis supplied.) *Sherman v. United States, supra,* at 372-73.

And in *Sorrells* we find these crucial distinctions:

"It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Grimm v. United States,* 156 U. S. 604, 610; *Goode v. United States,* 159 U. S. 663, 669; *Rosen v. United States,* 161 U. S. 29, 42; *Andrews v. United States,* 162 U. S. 420, 423; *Price v. United States,* 165 U. S. 311, 315; *Bates v. United States,* 10 Fed. 92, 94, note, p. 97. *United States v. Reisenweber,* 288 Fed. 520, 526; *Aultman v. United States,* 289 Fed. 251. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic,

the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells v. United States, supra* at 441-442. (Footnote omitted.)

In the evidence which we have set forth, we find ample grounds for affirmance of this jury verdict.

We are fully convinced that telling a third party to offer a bribe to a potential juror is a corrupt "endeavor to influence" within the meaning of the statute. 18 U. S. C. § 1503. We do not believe that this act is insulated from prosecution by failure, or by lack of actual intent on the part of the third party ever to make the approach. The falsity of Vick's statement pertaining to Elliott closely parellels the situation in *Lopez,* where the Supreme Court said:

"Davis was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. Compare *Wong Sun v. United States,* 371 U. S. 471. He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. Compare *Gouled v. United States, supra,* [225 U. S. 298]. The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally pro-

tected communication." *Lopez v. United States, supra* at 438.

Further, we find ample evidence to support this jury's rejection of the defense of entrapment. This transcript does not mirror the inducing of an unwilling party to commit a crime. This recorded conversation could have convinced the jury that defendant was a fully informed and eager jury tamperer, ready to seize the opportunity which he saw provided by Vick.

It seems significant to us that defendant was the first to name the juror supposed to be bribed; that after ascertaining that Vick had "gone pretty far," it was he who thought it might be desirable to move the conversation out of his office, presumably for the purpose of greater security; that it was he who decided that Vick should employ no intermediary in his contacts with the Elliott family; and that it was he who insisted that Elliott had to be chosen on the jury before the deal was complete or any money would be due.

Further, we regard the following portion of the transcript as peculiarly invulnerable to the interpretation that defendant had been reluctantly induced and entrapped into participation in a jury tampering scheme not resulting from his own plans and desires:

> "VICK: Oh, Now, I'm going to play it just like you told me previously, to reassure him and keep him from getting panicky, you know. I have reason to believe that he won't be alone, you know.
>
> "OSBORN: You assure him of that. 100%.
>
> "VICK: And to keep any fears down that he might have, see?
>
> "OSBORN: Tell him there will be at least two others with him."

In saying what we have said, we do not ignore the fact that defendant's principal point pertaining to entrapment

concerns his argument that in conversations prior to this one he had effectively been induced to participate in the scheme which involved the proposed bribing of Elliott. His testimony pertaining to these prior unrecorded conversations with Vick was evidence which the jury, if convinced of its accuracy, could have held to represent entrapment. But defendant's version of these prior conversations was not undisputed; Vick's testimony as to them was substantially different.

Generally, disputed fact questions concerning entrapment are for the jury to resolve. *Sorrells v. United States, supra; Sherman v. United States, supra* at 377, n. 8. And here, there is undisputed evidence (in the evidence just quoted) from which the jury could have found that at most what the alleged entrapper did (at least on the last visit) was to provide "opportunity" for violation of the law.

We certainly do not find here undisputed evidence of a case where:

> "[T]he Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Sherman v. United States, supra* at 376 (Footnote omitted.)

In defendant's brief much is made of the evil character of the informer, Vick. Vick's willingness to change sides from law enforcement to law violation, depending upon the inducement offered, seems apparent to us—as it doubtless did to the jury. While this moral flexibility was obviously one of the material issues bearing on the credibility of his testimony, it did not prevent jury consideration of that testimony—particularly where, as here, much of the testimony was corroborated by other evidence. *United States v. Thomas,* 342 F. 2d 132 (C. A. 6, 1965).

Defendant's protests about the unreliability of Vick are diminished in force by substantial corroboration of the most damaging of Vick's testimony. It must also be re-

membered that in the first instance he chose Vick to work for him on a jury investigation in a criminal case, well-knowing his police employment [2] and his reputation. And the credibility of defendant's own testimony was greatly damaged, as compared to his prior reputation, by the fact that he lied repeatedly under oath before the two District Judges about knowing anything at all about the Elliott approaches until he was confronted by the record of his own voice.

Further, as opposed to defendant's own testimony as to the nature of these unrecorded conversations, the jury had an opportunity to see and hear the testimony of the defendant and his accuser, Vick. The jury could, and doubtless did, compare the relative intelligence and determination and character and experience and legal training and knowledge of the two in determining whether or not Vick would be likely (as defendant claims) successfully to induce and entrap him.

Our review of the record indicates that there was evidence which required the United States District Judge to submit the case for jury decision.

Our review of the jury charge indicates that the issue of entrapment was properly submitted to this jury.

No challenge is brought to us pertaining to the impartiality of the jury which actually tried this case, nor to the events of the trial itself. Defendant made no motion for change of venue.

We are, however, confronted by a challenge to the composition and the impartiality of the grand jury which found the instant indictment. It is claimed that this grand jury was illegally impaneled and was preconditioned by preindictment publicity so as to deprive defendant of due process in its consideration of the government's evidence upon which the indictment was issued.

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2. At the time of Vick's first employment by defendant, he was a Deputy Sheriff.

The first of these issues has been recently and carefully considered by this court, and decided adversely to appellant's claims. *United States v. James R. Hoffa, et al.*, — F. 2d — (C. A. 6, 1965). Decided July 29, 1965. Although this case was before another panel of the court, we concur in the views therein expressed pertaining to the composition of this grand jury. *Swain v. Alabama,* 380 U. S. 202 (1965).

On the issue of appellant's claim of prejudice resulting from pre-indictment publicity and alleged failures of the judge properly to screen the grand jury panel for bias, we find no grounds for reversal. Mr. Justice Black's opinion in *Costello v. United States,* 350 U. S. 359 (1956), indicates the limited nature of appellate review of grand jury indictment proceedings. Much of Mr. Justice Clark's majority opinion in *Beck v. Washington,* 369 U. S. 541 (1962), could be read as directly applicable to the instant case:

> "Ever since *Hurtado v. California,* 110 U. S. 516 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. The State of Washington abandoned its mandatory grand jury practice some 50 years ago. Since that time prosecutions have been instituted on informations filed by the prosecutor, on many occasions without even a prior judicial determination of 'probable cause'—a procedure which has likewise had approval here in such cases as *Ocampo v. United States,* 234 U. S. 91 (1914), and *Lem Woon v. Oregon,* 229 U. S. 586 (1913) . . . .
>
> "In his attempts before trial to have the indictment set aside petitioner did not contend that any particular grand juror was prejudiced or biased. Rather, he asserted that the judge impaneling the grand jury had breached his duty to ascertain on *voir dire* whether any prospective juror had been influenced by the adverse publicity and that his error had been compounded

by his failure to adequately instruct the grand jury concerning bias and prejudice. It may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury. Compare *Lawn v. United States,* 355 U. S. 339, 349-350 (1958); *Costello v. United States,* 350 U. S. 359, 363 (1956); *Hoffman v. United States,* 341 U. S. 479, 485 (1951). But we find that it is not necessary for us to determine this question; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view—we have concluded that Washington, so far as is shown by the record, did so in this case." *Beck v. Washington, supra* at 545-46. (Footnote omitted.)

We hold that here, too, as in *Beck,* the appellant has not borne "the burden of showing essential unfairness" in relation to his indictment. *Beck v. Washington, supra* at 558.

The essential conflict of evidence developed in this trial pertaining to Count One concerned the initial conversations between Vick and defendant about prospective juror Elliott. Defendant's testimony varied in a number of respects (bearing on the defense of entrapment) from Vick's direct testimony. In this situation the appearance of the two District Judges to identify the Vick affidavit (upon which they authorized further investigation by use of a recording device) and the admission of the affidavit itself, were not reversible error. The affidavit was a prior record of a statement by Vick consistent with his direct testimony which defendant had attacked. The District Judge held that the affidavit and the circumstances surrounding its origin and use were proper rebuttal. We find no abuse of discretion or reversible error in this ruling. *Goldsby v. United States,* 160 U. S. 70 (1895); *United States v. Alaimo,* 297 F. 2d 604 (C. A. 3, 1961), *cert. denied,* 369 U. S. 817 (1962).

In this case at the conclusion of Judge Boyd's charge both sides stated that they had no exceptions to the jury instructions as given. We have reviewed the claims of error in the charge as given which defendant's counsel now presents on appeal and find no example of "plain error" therein. Rule 52(b) Fed. R. Crim. P. Taking the charge as a whole and its paragraphs in their proper context, we find the charge essentially fair.

As to the instructions submitted by defendant but denied or not employed by the District Judge, we find no reversible error. In most instances cited the instruction was properly covered in the Judge's own language. Under the evidence in this case we do not believe that defendant was entitled to defendant's proffered instructions No. 4 or No. 24.

Defendant's proffered instruction No. 4 would have told the jury that they could not consider any evidence offered pertaining to one count in determining the truth or falsity of the other count. This instruction was not given and the District Judge did charge "that an existing disposition to commit a similar offense is an important factor to consider in determining whether there was a subsequent entrapment." We believe that where entrapment is offered as a defense, that this charge is a proper one. *Knight v. United States,* 310 F. 2d 305 (C. A. 5, 1962).

Here evidence pertaining to Count Two was such that the jury might have concluded that defendant rejected the opportunity to make a bribe attempt largely because he deemed it impractical and unlikely to succeed, rather than because he rejected the whole idea.

Defendant's own testimony concerning his conversations with Henry Beard pertaining to juror, Mrs. Harrison, and his subsequent employment of Beard for reporting on jury panel members' backgrounds is hardly consistent with the argument of innocent gullibility which defendant proffered to the jury. We do not believe that the judge's refusal to instruct that the jury could not consider the testi-

mony pertaining to Count Two (in the event they rendered a Not Guilty verdict thereon) was error.

We find no other issues of substance on this appeal and our review of the record does not disclose any reversible error.

Affirmed.

APPENDIX B.

Judgment.

Filed
August 30, 1965
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Z. T. OSBORN, JR.,
Defendant-Appellant.

Before: MILLER, O'SULLIVAN and EDWARDS, *Circuit Judges.*

JUDGMENT.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee, Nashville Division, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX C.

Order on Petition for Rehearing.

No. 16,056.

Filed
October 8, 1965
Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Z. T. OSBORN, JR.,
Defendant-Appellant.

ORDER.

Before: MILLER, O'SULLIVAN and EDWARDS, *Circuit Judges.*

A petition for rehearing having been received in the above-styled case and careful consideration having been given to its contents in the brief filed in support thereof, said petition is hereby DENIED.

Entered by order of the court:

CARL W. REUSS,
Clerk.

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